IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE Tmt.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.12509 of 2017
and
W.M.P.No.13301 of 2017

M/s.Kamatchi Envelops
Represented by its Proprietrix
Mrs.V.Sivakamasundari
No.47-C, Grounds Floor
Rajaji Street, Ram Nagar
Coimbatore - 641 001 .. Petitioner

vs

1.Corporation Bank
Oppankara Street Branch
Coimbatore

2.The Debts Recovery Tribunal
Coimbatore

3.The Debts Recovery Appellate Tribunal
Chennai .. Respondents

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari calling for the entire records, leading to the impugned order made in M.A.No.44 of 2015 dated 29.12.2016 on the file of the 3rd respondent and quash the same.

For Petitioner : Mr.Sairam
for Mr.N.Naganathan

For Respondents: Mr.K.A.Ramakrishnan for R1

O R D E R

(Made by S.MANIKUMAR, J.)

Order of the Debts Recovery Appellate Tribunal, Chennai, dated 29.12.2016, impugned in this writ petition, is as follows:

" ORDER

1. Appellant has challenged the order dated 19.02.2015 of DRT, Coimbatore in MA 61/2014 in OA No.29/2010, by which declining restoration of OA which was dismissed for default on 19.05.2014.

2. Ld. Counsel submits that Respondent has borrower a sum of Rs.25 Lakhs from the Bank on 03.09.2007 due to non payment, it was classified as NPA. On 08.07.2009, bank preferred OA for recovery of aforesaid amount. On different dates practicability on all accounts at least Junior counsel made appearance on behalf of bank, but on 19.05.2014 there was nobody for bank to make representation before DRT, hence DRT has dismissed the OA for want of appearance.

3. Vide impugned order restoration was declined only due to negligent conduct of the bank officers shown by them from time to time in DRT. In the present case, the Respondent did not appear despite due service on bank, which is evident from the acknowledgment due card submitted by the Appellant. In the impugned order of DRT, as mentioned, on various dates about the absence of bank officials and counsel. In the written submissions, appellant bank also reflected various dates that the junior counsel made appearance in DRT.

4. Which Ld. Counsel was authorised by the Respondent Borrower/Defaulter Mr.Liyakat Ali or Mr.C.Veeraraghavan is not the main issue in the present case. Written submissions of parties will also be not of much help in the present case, because nothing has been decided on merits in so far as recovery is concerned.

5. Taking a comparative view of the factual situation as reflected in impugned order and as said by the Appellant one in his name that recovery of a sum of Rs.25 Lakhs of the bank is at stake. If bank shows negligence then it is suicidal against them. So losing interest on money, in case any bank officer is showing mischief or negligence, he may lose his job also. But such dismissal will definitely unduly help the borrower. It is not the way of adjudication of the recovery matter.

6. Considering the aforesaid and with a view to ensure the adjudication of recovery matter on merits

in a substantial manner this Appeal is allowed. Impugned order is set aside. Appellant is directed to make its appearance before DRT on 16.01.2017 to participate in the OA.

7. Let copy of this order be made available to DRT, Coimbatore for compliance.

8.MA 44/2015 is disposed of accordingly."

2. Material on record discloses that on 19.05.2014, there was no representation for the first respondent-bank and hence, the Tribunal dismissed the Original Application. No sooner the bank came to know of the same, the learned counsel immediately, filed a petition to restore the original application. Among other reasons assigned for non-representation, was that the case bundle was misplaced and that the advocate for the bank shifted his office. To this effect, an affidavit from the clerk of the advocate on record, has been filed. M.A. No.61/2014 has been filed to restore the original application was filed, within a period of 30 days from the date of dismissal. After considering the rival submissions and arguments, the Debts Recovery Tribunal, Coimbatore, vide order dated 19.02.2015 made in M.A.No.61/2014 dismissed the MA.

3. Being aggrieved by the same, bank has filed M.A.No.44 of 2015 on the file of the Debts Recovery Appellate Tribunal, Chennai, contending inter alia that, in all the hearing dates, the first respondent/appellant therein, was absent and that dismissal of the restoration petition, would cause serious and irreparable loss to the bank, besides a boon to the petitioner herein, who is a willful defaulter.

4. Contention has also been made that the Debts Recovery Tribunal, Coimbatore, has failed to consider that, the reason for non-representation was that the case bundle was misplaced, in the office of the learned advocate on record. Though an affidavit from the Advocate Clerk was filed explaining sufficient cause, and written submissions were also filed by the bank in detail explaining the reasons for non-representation, DRT, Coimbatore, has erroneously dismissed M.A.No.61/2014.

5. Though Mr.Sairam, learned counsel appearing for Mr.N.Naganathan, counsel on record for the borrower/petitioner, has assailed the correctness of the order made in M.A.No.44 of 2015 dated 29.12.2016 on the file of the DRAT, Chennai, on other grounds, stated in the accompanying affidavit to this writ petition, this court is not inclined to reverse the order, for the reason that the Tribunal has considered the interest of the bank vis-a-vis negligence of

the bank official, if any, or even the learned counsel for the matter, who has not appeared. As regards, the mistake or the default of the learned counsel, we deem it fit to consider few decisions.

(a) In Rafiq & Another Vs. Munshilal & Another, reported in 1981 AIR SC 1400, the counsel for the appellant did not appear, the appeal was disposed of. When the appellant was aware of the fact that his appeal had been disposed of, in the absence of his advocate, he moved an application to the High Court, to recall the order, dismissing the appeal and prayed to permit him to participate in the hearing. The said application was rejected by the High Court. On further appeal, the Hon'ble Supreme Court, at para No.3, held as follows:

> "The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent.

The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K.Sanghi."

(b) In Goswami Krishna Murarilal Sharma v. Dhan Prakash, reported in (1981) 4 SCC 574, the appellant's counsel withdrew from the case, stating that he had no instructions from his client. Granting permission to withdraw, the Hon'ble High Court, dismissed the appeal. The High Court declined to restore the appeal. On the above facts, at para '7 ', the Hon'ble Apex Court, held as as follows

"Now, the appellant had engaged his advocate who withdrew, the reasons for withdrawal being known only to the learned Advocate and not ascertainable from the record. It is difficult to appreciate how the Court straight away proceeded to dismiss the appeal on the ground that the appellant in person is not present. It is all the more disquieting how the High Court declined to grant the application for restoration of appeal and to hear it on merits. Without dilating upon this point, relying on the decision of this Court in Rafiq v. Munshilal [cited supra], we think that the appellant's appeal which was admitted by the High Court should have been heard on merits after giving an opportunity to engage another advocate."

Ultimately, the Hon'ble Apex Court, set aside the order of the High Court, directed restoration of the appeal and hear the appeal on merits.

(c)(i). In Smt.Lachi Tewari & Others Vs. Director of Land Records and Others, reported in AIR 1984 SC 41, the appellant engaged three Advocates. Rule nisi was issued and an interim order in favour of the appellant was granted. When the matter came up for first hearing, after the rule nisi was issued, there was no representation on behalf of the appellant. By observing that there was none to press the application, a Hon'ble Division Bench, discharged the rule, and vacated the interim order. Within 10 days, an application was moved to recall the order, on the grounds that when the case was posted on the reopening day, one of the learned counsel could not return on account of irregularity of Air services, and that the other two counsel were engaged in other courts. High Court did not accept this reason.

(ii). Testing the correctness of the order and following the judgments in Rafiq & Another Vs. Munshilal & Another, reported in 1981 AIR SC 1400 and Goswami Krishna Murarilal Sharma v. Dhan Prakash, reported in (1981) 4 SCC 574, the Hon'ble Apex Court, set aside the orders of the High Court, restored the matter, and further held that, the interim order, as revived.

(d) In Tahil Ram Issardas Sadarangani Vs. Ramchand Issardas Sadarangani, reported in AIR 1993 SC 1182, the counsel withdrew his appearance. Client was not aware of the hearing date. There was nothing on record to show that the petitioner therein, had the notice of hearing. He was not present. The petition was dismissed for default. Plea for restoration was rejected. On appeal, the Hon'ble Supreme Court, set aside the orders of the High Court.

(e) In Sushila Narahari & Others Vs. Nand Kumari, reported in 1996 (5) SCC 529, the Advocate engaged has derelicted in his duty to inform his client by registered post, if there was any non-cooperation on behalf of the appellants therein. When the suit came up for trial, he had withdrawn his vakalatnama, without notice to his clients/appellants. The trial court set the appellants exparte and decreed the suit. Application filed to condone was dismissed. On appeal, the Hon'ble Supreme Court, by observing that the appellant is justified, condoned the delay. Thus, in the above reported case, it could be inferred that for the fault of the lawyer, the party was not made to suffer.

(f) In K.Balakrishnan v. The Special Tahsildar (L.A.), North Neighbourhood Project, Madura reported in 1996 (2) MLJ 236, while considering sufficient cause, and the prejudice caused, due to the fault of the counsel, at paragrpah 14, this court held thus:

> "14. Even if the principle that because of the counsel's mistake the parties should not suffer, the mistake of the counsel should be a bona fide one. The mistake cannot be a wanton or wilful. In such cases, the court cannot come for the rescue of both the counsel as well as the litigant. Hence, I am of the opinion that the delay has not

been properly explained and the explanation given by the petitioner will not amount to a sufficient cause as per Section 5 of the Limitation Act. I am fortified with the judgment of the Supreme Court reported in G.Ramegowda v. Special Land Acquisition Officer, Bangalore, in which it has been held as follows:

The contours of the area of discretion of the courts in the matter of condonation of delays in filing appeals are set out in a number of pronouncements of this Court. See Ramlal v. Reva Coalfield Limited , Shakuntala Devi v. Kuntal Kumari , Concord of India Insurance Co. Limited v. Nirmala Devi , Mata Din v. A. Narayanan , Collector, Land Acquisition, v. Katiji . There is, it is true, no general principle saving the party from all mistakes of its counsel. If there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. Each case will have to be considered on the particularities of its own special facts, However, the expression 'sufficient cause' in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay. In Katiji's case, this Court said:

When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

(g) A Hon'ble Division of this court in Avvai Home v. Arulmighu Arunachaleswarar Devasthanam, Thiruvannamalai reported in 1999 (1) MLJ 355, while considering a sufficient cause beyond the control of the party invoking the aid of Limitation Act, at paragraph Nos.16, 18 and 19 held thus:

16. In the instant case, where the delay was not deliberate, but on entrustment to the clerk to

file the vakalat, with a bona fide belief that he might have filed, the counsel did not follow the case, : not doing it, the lapse should not affect the party who did his part of the work bona fide believing his counsel. In such a situation, where the lapse was not deliberate or does not smack of mala fides or not intended to adopt any dilatory strategy, it would be a just case to condone the delay, but without making the effort and time of the other side a waste. In other words, an adequate cost would meet the ends of justice to compensate the party for his loss.

18. Normally, sufficient cause must be a cause which is beyond control of the party invoking the aid of the section. For somebody else's negligence or fault, the party or the substantial justice should not be allowed to suffer; Where neither negligence nor want of bonafide is imputable to the party for the delay in filing, it would constitute sufficient cause. Where the party did everything at his command, but the lapse is on the part of the counsel, it affords a ground for condonation. But a slip due to accidental mistake or oversight by a pleader or on the ground of illness may be excused. These are all excusable oversight of a party's advocate, which at times require a liberal approach from the point of the party concerned, where there was no negligence on his part. Not following up the case after engaging a counsel, even assuming that it can come within the ambit of honest mistake, even such mistake is entitled for excuse and comes within the meaning of 'sufficient cause' for excusing the delay.

19. Keeping the nature of the order, the consequences and the conduct of the party and non-mentioning of the disposal in the suit register, all put together, it indicates a bona fide inaction imputable to the counsel. Therefore, we disagree with the reasoning of the learned trial Judge and we are of the opinion that the explanation constitutes sufficient cause to condone the delay. But for the mistake or inaction on the part of the counsel, the respondent should not be made to suffer for the fault of others.

(h) In G.Krishnamoorthy v. Arulmighu Sri Pataleeswarar Devasthanam, rep. By its Executive Officer, Thirupapuliyur, Cuddalore reported in 2010 (1) MWC 837 (Civil), a suit was decreed ex parte, for non-prosecution and non-filing the written statement. Execution proceedings were also launched. An application to condone the delay in setting aside the ex parte decree, was filed under Section 5 of the Limitation Act, on the ground that the Advocate did not inform him properly and that there was also no communication from the lawyer. Accepting the reasons stated and following Rafiq Munshilal's case (cited supra), a learned Single Judge of this Court has condoned the delay, on payment of costs.

6. On the facts and circumstances of this case, it could be seen that bank has offered plausible reasons, for non appearance. Application to restore, has been filed within time. As rightly observed, public money lent to a person, has to be recovered, and the borrower, cannot take advantage of a mistake, which is bonafide.

7. In Collector, Land Acquisition, Anantnag v. Katiji reported in (1987) 2 SCC 107, the Hon'ble Apex Court held as follows:

> "........
> 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay."

8. Though the Hon'ble Supreme Court, in the above cited case observed that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay, the said principle, can be applied to the facts of this case also.

In the light of the discussions and decisions, writ petition is dismissed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

asr

To

1.Corporation Bank,
Oppankara Street Branch,
Coimbatore.

2.The Debts Recovery Tribunal,
Coimbatore.

3.The Registrar
Debts Recovery Appellate Tribunal
Chennai.

+1cc to Mr.N.Naganathan, Advocate sr.49240

+1cc to Mr.S.Sukumar, Advocate sr.49072

W.P.No.12509 of 2017 and
W.M.P. No.13301 of 2017

br(co)
ss(22/9/2017)